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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 456

JACK GREEN,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

JACK GREEN,
Petitioner,

KENNETH W. LACKEY,
Attorney at Law,
Eufaula, Oklahoma,

Attorney for Petitioner.

October, 1958.

LITTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8750

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the Criminal Court of Appeals of Oklahoma entered on the 25th day of June, 1958, in the above styled and numbered cause.

OPINIONS BELOW

The petitioner, a defendant in the trial court and plaintiff in error in the Criminal Court of Appeals of Oklahoma, sought to withdraw his plea of guilty and substitute a plea of not guilty to the charge of "Burglary, Second Degree." The application was denied by the trial court and an appeal

was immediately lodged with the Criminal Court of Appeals of Oklahoma. The Criminal Court of Appeals denied the relief sought and affirmed the judgment of the trial court. A petition for rehearing was filed and denied by the Court. The opinion of the Court is included in Appendix "A."

JURISDICTION

The right of this petitioner to seek relief in this Court is based on the statutes of the United States, i.e., Title 28, Section 1257(2)(3) of the United States Code.

THE FEDERAL QUESTION

The federal question to be considered is whether or not the petitioner was illegally and unlawfully deprived of his right to a trial by jury as guaranteed by the Constitution of the United States, Amendment VI, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation * * *."

In the presentation of this matter, the pivotal issue for consideration is whether or not the petitioner waived his right to trial by jury. The statutes of the State of Oklahoma, that have an application to this matter are as follows, to-wit:

Title 22, Oklahoma Statutes, Section 516:

"A plea of guilty can in no case be put in, except by the defendant himself, in open court, * * *."

Title 22, Oklahoma Statutes, Section 517:

"The court may, at any time before judgment, upon a plea of guilty, permit it be withdrawn, and a plea of not guilty substituted."

The record in this case will disclose that on the 7th day of November, 1956, this petitioner entered a plea of guilty to the charge designated, "Burglary, Second Degree", the same being based on a violation of the following statutes of the State of Oklahoma, to-wit:

Title 21, Oklahoma Statutes, Section 1435:

"Every person who breaks and enters any building or part of any building, room, booth, tent, railroad car, automobile, truck trailer, vessel or other structure or erection in which property is kept, with intent to steal therein or to commit any felony, is Guilty of Burglary in the Second Degree."

Title 21, Oklahoma Statutes, Section 1436:

"Burglary is punishable by imprisonment in the penitentiary as follows:

1. * * *

2. Burglary in the second degree not exceeding seven years and not less than two years."

Thereafter, the petitioner-defendant filed his written application for permission to withdraw his plea of "Guilty" and substitute a plea of "Not Guilty" and stand ready for jury trial, and the court denied this application and said peti-

tioner-defendant was sentenced to serve a term in the Oklahoma State Penitentiary of three years.

The courts of the State of Oklahoma have set down certain rules of interpretation of the statutes as to when a plea of guilty may be withdrawn and plea of not guilty substituted. We, as will hereinafter be presented, respectfully state that the trial court and the Criminal Court of Appeals of the State of Oklahoma, have illegally and unlawfully deprived this petitioner-defendant of his right to a trial by jury as guaranteed by the Constitution of the United States.

REASONS FOR THE ALLOWANCE OF THE WRIT

The Criminal Court of Appeals of the State of Oklahoma had before it the following reasons why the withdrawal of plea of guilty should have been allowed, to-wit:

a. The plea of guilty must have been entirely voluntary without persuasion, promises or ignorance;

b. The plea must not have been based on promises by the County Attorney;

c. The plea of guilty was entered by the petitioner-defendant without having benefit of counsel;

which according to the laws of the State of Oklahoma were sufficient grounds to justify the withdrawal of the plea of guilty and the substitution of the plea of not guilty.

In an appeal based upon the refusal of the trial court to allow the person charged, to withdraw his plea of guilty

and stand for trial by jury, the following rules were promulgated:

Fromcke v. *State*, 37 Okla. Cr. 421, 258 Pac. 927:

> "A defendant in a criminal case should be permitted to withdraw his plea of Guilty, given unadvisedly, either before or after judgment, where any reasonable ground is offered for going to a jury.";

and in *Hardzog* v. *State*, 49 Okla. Cr. 244, reciting the quotation from the *Fromcke* case, with these additional:

> "And, while this is a matter within the discretion of the Court, the discretion is a judicial one which should be always exercised in favor of a trial."

The Criminal Court of Appeals has set down certain requirements to assist the trial courts in the determination of what is an abuse of discretion:

Peterson v. *State*, 58 Okla. Cr. 391:

> "A plea of Guilty should be entirely voluntary, by one competent to know the consequences, and should not be induced by fear, persuasion, promises or ignorance.
>
> * * * * * * * * *
>
> "The plea of guilty should be freely and voluntarily made by one competent to know the consequences, and should not be induced by * * * persuasion, promises or ignorance."

Morgan v. *State*, 33 Okla. Cr. 257 (a misdemeanor):

> "Generally speaking, an agreement whereby the prosecuting attorney promises the performance of cer-

A (Mr. Green) No.

Q. Did you have an attorney at the time that you entered your plea of guilty in November?

A. No, sir."

(C-M. 57-58):

Q. "(Mr. Lackey) Jack, immediately before November of 1956, this case was set for trial on the District Court docket, was it not?

A. (Mr. Green) Yes.

Q. And you didn't have an attorney to represent you?

A. I didn't have the money to hire an attorney.

Q. Then you didn't have an attorney?

A. No sir."

As to the statements and promises by the County Attorney influencing the defendant in entering his plea that constitute the basis for the allegation that the plea of guilty (which in effect waived the trial by jury) was not without "persuasion, promises or ignorance", we find the following evidence (C-M. 50):

Q. "(Mr. Lackey) Jack, did you, while you were in jail—did you have an opportunity to discuss this case with the County Attorney of this County?

A. (Mr. Green) While I was in Jail? No, except one time he came over there.

Q. Was that before or after you entered your plea of guilty?

A. That was before I entered by plea of guilty.

Q. What, if anything, did the County Attorney say to you at that time about this case?

A. He came over there and was telling me that they were going to turn those two other boys loose; and if they turned those boys loose, he would see to it that I was turned loose, too. Even though he might be out of job, and he might have to pick cotton.

Q. There were three (3) persons that were charged with the same crime that you are charged with?

A. Three counting me.

Q. And what were their names:

A. Judea Harjo and R. C. Arteberry.

Q. And the County Attorney advised you that if the other two boys weren't prosecuted, that you would be turned loose, too?

A. Yes, sir.

. . . . . .

Q. (Mr. Lackey) Would you tell the Court what the conversation consisted of?

A. (Mr. Green) Well, it was four or five times that we went to see him. I went to see him three times when he lived over here on this—over back by—NE. of town, and every time that we went to see him it was about the same thing—he would tell me that if they turned the other boys loose, they would also turn me loose.

Q. Now, just immediately before you entered your plea of guilty, did you have—did you talk to the County Attorney, then?

A. Yes, me and my wife went out to his house when he lived out—over by Vivian Hill, back in there.

Q. And did you discuss this case with him that time?

A. Yes.

Q. Was it day or night?

A. It was night.

Q. And what was the—what did the County Attorney tell you at that time?

A. We, at that time, my mother was sick and in pretty poor health, and I asked him if there was anything that we could do—that I was supposed to be coming up for entering my plea and he told me that if I would come in and enter a plea of guilty that he would ask for time before they sentenced me.

Q. Was the matter of whether or not the other two were prosecuted discussed at that time?

A. Yes, I asked him, and he told me—every time he would say, 'If they turn them loose, I am going to turn you loose, too.'

Q. Now you understand that the other times you hadn't entered a plea of guilty, and you understood that this time you were admitting that you were guilty by entering a plea of guilty?

A. Yes, sir.

Q. Was there any statement made by the County Attorney even after you entered your plea of guilty that it could be withdrawn or that the case be dismissed or anything?

A. Yes, he said it could be withdrawn, and that the case could be dismissed, and he also told me another time when we were in the County Attorney's office, he had them copy some—write some affi-

davits and if I could get them signed they would dismiss the charges against me.

Q. Now, was that before or after that you had entered your plea of guilty?

A. After I entered my plea of guilty.

Q. After you entered your plea of guilty?

A. Yes, sir.

Mr. Lackey: I hand you what has been marked for the purpose of identification defendant's exhibit #1; and ask you if you have seen this before?

A. Yes, sir.

Q. What is it?

A. That is the affidavit that he gave me to—or had his secretary type for me to take to these people.

Q. Now, that date on there is January 3, 1957. Do you remember whether or not that is the date that was made or not?

A. Yes, sir, that was the date.

Q. And you were—were you to take these affidavits—what were you to do with these affidavits?

A. I was to take this to the people that I was supposed to have burglarized, and get them to sign it and they would dismiss the charges against me.

Q. Now, the County Attorney told you that he would dismiss the case if the people would sign that?

A. Yes, and then before I could get to them—"

(C-M. 58-59):

Q. "(Mr. Lackey) Mrs. Green, do you recall whether or not you went to Mr. Webb's home with Jack Green to discuss this case?

A. (Mrs. Green). Yes, sir, I have.

Q. At that time, did you engage in any conversation with Mr. Webb? Or hear any conversation with Mr. Webb?

A. I didn't talk to him myself. I listened to him and Jack.

Q. Did you hear Mr. Webb—tell us what conversation you heard.

A. Jack talked to Mr. Webb about what he could do about the case down here, and he kept telling him all the time to plead guilty and he could see what he could do about it. That he thought that that was about the only choice. If he would plead guilty that he would see that he wouldn't get no time if the other boys didn't get any time.

Q. That was before Mr. Green plead guilty?

A. Yes, sir."

(C-M. 71-72):

Q. "(Mr. Lackey) Mr. Webb, did you tell Mr. Green prior to the time that he entered a plea of guilty that if the circumstances changed that he could withdraw his plea of guilty?

A. (Mr. Webb) I never did.

Q. What did you have in your mind—how could you dismiss a case with a plea of guilty—without permitting him to withdraw his plea of guilty?

A. Oh, I intended to recommend that the cases be dismissed if he brought me signed affidavits from the victims of these burglaries that they didn't want him prosecuted.

Q. In spite of the fact that the plea of guilty was entered?

A. I intended to do that. I don't know what—and I told him that I didn't know whether the Court would get me filled out affidavits that the victims didn't want him prosecuted."

romises as to penalties:

(C-M. 74-75):

Q. "(Mr. Webb) State what that conversation was.

A. (Clarence Douglas) Well, Jack Green said if I plead guilty to it, what kind of a deal can I get. And you said you would recommend a minimum."

(C-M. 70):

Q. "(Mr. Lackey) * * *

A. (Mr. Webb) It was while he was down there in jail. I don't remember the exact date. He made an agreement to plead guilty in these two cases and take a term of five years in the penitentiary in each case and I agreed that if he would do that, I would ask the Court to let these two sentences run concurrently. There were two other boys charged with these same two crimes and I told him after he made his agreement—I advised him not to plead guilty then until he talked to an attorney or until the disposition of these other two cases was made. I, at no time, promised that he would

not go to the penitentiary; but in fact, I stated to him that he would go because he was not eligible for a suspended sentence, because—"

(C-M. 73):

"Mr. Webb: I have another statement that I would like to make. I did agree after these other cases were disposed of and Jack pled guilty that I would recommend the minimum sentence to him in this case."

(C-M. 77):

The Court: Do you have a recommendation, Mr. Webb?

Mr. Webb: Three years.

The Court: To run concurrently?

Mr. Webb: There is just one case.

The Court: What are you going to do with the other cases?

Mr. Webb: If he is sentenced, I will probably dismiss it.

* * * * * * * * *

The Court: Do you have anything to say why the sentence of the Court should not be passed at this time?

Mr. Lackey: Yes, sir. The County Attorney upped the sentence time to three years just because he found out we were going to appeal.

The Court: He told me five. It is the judgment and sentence of the Court that the Defendant be confined for a period of three years at hard labor in the State Penitentiary at McAlester, Oklahoma."

CONCLUSION

For the foregoing reasons this petitioner respectfully prays that a Writ of Certiorari should be granted.

Respectfully submitted,

JACK GREEN,
Petitioner,

KENNETH W. LACKEY,
Attorney at Law,
Eufaula, Oklahoma,

Attorney for Petitioner.

October, 1958.

APPENDIX "A"

Filed
In Criminal Court
of Appeals
of Oklahoma
Jun 25 1958
Andy Payne, Clerk.

IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

Jack Green,
Plaintiff in Error

vs

No. A-12, 584

The State of Oklahoma,
Defendant in Error

SYLLABUS

The granting and denying of permission to withdraw a plea of guilty and substitute a plea of not guilty is a matter within the sound discretion of the trial court and its action will be upheld unless an abuse of such discretion clearly appears from the record.

APPEAL FROM THE DISTRICT COURT OF McINTOSH COUNTY, OKLAHOMA

HONORABLE W. A. LACKEY, JUDGE

Plaintiff in Error, Jack Green, was convicted of the crime of burglary in the second degree, sentenced to serve a term of three years in the state penitentiary, and he appeals.

[APPENDIX A]

AFFIRMED

Kenneth W. Lackey, Eufaula, Oklahoma,
Attorney for Plaintiff in Error.

Mac Q. Williamson, Attorney General.

Sam H. Lattimore, Asst. Att. Gen.,
Attorneys for Defendant in Error.

BRETT, P. J.

Plaintiff in error, Jack Green, defendant below, was charged by information in the District Court of McIntosh County, Oklahoma, with having, on or about December 4, 1955, committed the crime of burglary in the second degree. It was alleged that he and two other persons burglarized the home of one Dale Williams and stole therefrom the sum of thirty-five dollars in cash. The defendant first entered a plea of not guilty, later withdrew the plea and entered a plea of guilty and was sentenced thereon to a term of three years in the penitentiary.

Before judgment and sentence were entered, the defendant filed a motion for leave to withdraw his plea of guilty and enter a plea of not guilty and stand trial. He pled and offered in support thereof proof to the effect that he entered his plea without the aid of counsel and further alleged the plea of guilty was entered on the representation of the County Attorney that his co-defendants had made a confession and pled guilty and on the strength of their confessions the defendant would be convicted. He further pled and offered in support that the County Attorney advised him that if his co-defendants were not prosecuted, he would dismiss the charge against the defendant. It is contended on the strength of this proof he should be permitted to withdraw his plea of guilty and stand trial, and for the further reason he is not guilty of the charge.

On cross-examination of the defendant, it was disclosed he was not ignorant and inexperienced in such mat-

ters, he having prior convictions in the Federal Court for larceny of an automobile and a conviction for breaking and entering in the State of Wisconsin. The state's proof on the motion was to the effect the County Attorney at no time ever indicated the defendant would not be sentenced on his plea of guilty, nor was he advised he would not have to go to the penitentiary. To the contrary, the record affirmatively shows the defendant was advised by the County Attorney that because of his record, he would not be eligible for suspended sentence. It appears the County Attorney advised him, when he first decided to plead guilty, he would recommended a five year sentence, but let that sentence run concurrently with another charge pending against him. The County Attorney admitted, however, that he told the defendant that if the other defendants went "scott-free", he would try to keep the defendant, Green, from going to the penitentiary. The record discloses one of his co-defendants agreed to and did join the army, and because thereof, his case was dismissed. The other co-defendant entered a plea of guilty and because he was without prior record, was given a suspended sentence. It appears from the record that trial judge Lackey advised the defendant at the time he was arraigned he had the right to an attorney if he wanted one and at no time did he give him any indication that if he entered a plea of guilty he would not be sentenced to the penitentiary, but instead informed him he was not eligible for suspended sentence because of his prior convictions. The trial court further stated the imposition of sentence was deferred many times (the record shows at least nine times) because the County Attorney of Muskogee County asked the same to be deferred because Green was the defendant in an action pending therein. On these facts, the trial court refused permission to withdraw the plea of guilty and on October 7, 1957, judgment and sentence were entered.

tain acts in consideration of entering a plea of Guilty is of no effect as binding on the Court in its disposition of the case but * * * wherein it appeared that the agreement * * * had been made with the cognizance of that Court, it was held that * * * the defendant should have been permitted to withdraw his plea of Guilty, which had been filed in reliance in the performance of the agreement."

Porter v. *State*, 58 Okla. Cr. 54:

"This Court has repeatedly held that in a felony case, and especially in a capitol case, if the defendant pleads Guilty without the benefit of counsel, or was influenced to enter such a plea by his counsel or the prosecutor, or by the acts of the Court, he should be accorded the right of trial by jury, or be permitted any time before judgment to withdraw his plea of guilty and substitute the plea of Not Guilty."

Mullen v. *State*, 28 Okla. Cr. 218 (Murder), making substantially the same statement as the *Porter* case, added:

"In such cases the refusal of trial court to permit this to be done would be considered an abuse of discretion."

Harjo v. *State*, 106 P.2d 527:

"An agreement for a plea of Guilty made between a defendant and the prosecuting officer should be carefully scrutinized, and, when it reasonably appears that a defendant is laboring under a misapprehension at the time he enters his plea of Guilty and makes such fact known in apt time, he should be permitted to withdraw his plea of Guilty and enter a plea of Not Guilty."

Shaw v. *State*, 179 P.2d 169:

"Where a plea of Guilty is entered without the aid of counsel * * * the Court will closely scrutinize the same as to the end that the defendant may not be deprived of any of his substantial rights."

To attempt to construe the above rules, we must first determine what the question is. It is the position of this petitioner-defendant that in view of the rules set forth by the Criminal Court of Appeals of Oklahoma, do not, when applied to the facts constitute a waiver of trial by jury. The facts on which we rely are as follows:

The testimony as to representation by an attorney.

As to an attorney:

Mr. Green's testimony as the hearing on Application for Permission to Withdraw Plea (C-M. 49-50):

Q. "(Mr. Lackey) I will ask you Jack, whether or not that after you had been arraigned in District Court, if I appeared and requested that your bond be reduced for you, before this Court?

A. (Mr. Green) Yes, sir.

Q. And did I continue to represent you or not?

A. No, sir, no one represented me after you.

Q. And did I continue to represent you and did I represent you at the appearance in January 3, 1956?

A. No, sir."

(C-M. 51):

Q. "(Mr. Lackey) Did you have an attorney at the time that the bond was made February 17, 1956?

[APPENDIX A]

It has been repeatedly held by this Court that the granting and denying of permission to withdraw a plea of guilty and substitute a plea of not guilty is a matter within the sound discretion of the trial court and its action will be upheld unless an abuse of such discretion clearly appears from the record. *Sanders* v. *State*, 72 Okla. Cr. 85, 113 P.2d 198; *Roberts* v. *State*, 72 Okla. Cr. 384, 115 P.2d 270; *Williams* v. *State*, Okla. Cr., 303 P.2d 980. It is apparent from the record that the question of whether or not the County Attorney influenced the defendant in entering his plea of guilty is one in which the evidence thereon is in great conflict. Under these conditions, it presented a matter for the determination of the trial court, and since there is evidence reasonably tending to support his findings, they are binding on this Court. It clearly appears that certainly no such agreement as is contended for by the defendant with the County Attorney was made with the cognizance of the Court. Moreover, we are of the opinion that the record does not support the defendant's contention in relation to the purported agreement with the County Attorney. To the contrary, it clearly appears that the County Attorney at no time ever held out to the defendant he would not go to the penitentiary on his plea of guilty, unless his co-defendants went free and then he would try to prevent the defendant from having to go to the penitentiary. Moreover, it does not appear that either the County Attorney or the Court took advantage of the defendant because of his ignorance or inexperience or that he was denied the right to aid of counsel.

We are of the opinion the trial court did not abuse its discretion in refusing to grant the defendant leave to withdraw his plea of guilty and substitute a plea of not guilty. The judgment and sentence is accordingly affirmed.

Powell and Nix, JJ., concur.

[APPENDIX A]

IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

July 11, 1958

Order—

Clerk directed to issue mandate.

John A. Brett, Presiding Judge.